

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

THELMA S. MADRIGAL,

Plaintiff,

v.

RECONTRUST COMPANY, N.A., et  
al.,

Defendants.

2:12-CV-367 JCM (RJJ)

**ORDER**

Presently before the court is defendant ReconTrust Co., N.A.'s motion to dismiss. (Doc. #4). Plaintiff Thelma Madrigal has filed an opposition (doc. #8), to which defendant has responded (doc. #10). Also before the court is plaintiff's motion to remand. (Doc.#7). Defendant filed a response (doc. #11), to which plaintiff replied (doc. #12).

**Factual Background**

The property at issue is located at 5371 Calgary Court, Las Vegas, NV 89118. (Doc. #1, Ex. 1). On or about August 2, 2004, Madrigal and her husband signed a promissory note in favor of Greystone Financial Group ("CCSF"), in the principal amount of \$550,000.00 (the "loan"). (Doc. #1, Ex. 1). Plaintiff also executed a deed of trust along with the loan, and both were recorded on September 2, 2004, in the Clark County recorder's office. (Doc. #4, Ex. A). In the deed of trust, Mortgage Electronic Registration System, Inc. ("MERS") is named as a nominee. (Doc. #4, Ex. A).

1 On or about August 17, 2009, MERS recorded an assignment of deed of trust, assigning the  
 2 subject of the note of the deed of trust to the Bank of New York fka the Bank of New York as trustee  
 3 for the certificateholders Cwalt, Inc. ("Mellon"). (Doc. #4, Ex. B).

4 On May 1, 2009, plaintiff defaulted on the loan. (Doc. #1, Ex. A). On or about September  
 5 10, 2009, Mellon recorded a substitution of trustee to ReconTrust. (Doc. #4, Ex. C). On or about  
 6 September 14, 2009, ReconTrust recorded a notice of default and election to sell the property. (Doc.  
 7 #4, Ex. E).

8 On or about January 3, 2012, the foreclosure mediation program issued a certificate allowing  
 9 the foreclosure to proceed. (Doc. #4, Ex. F). On or about January 23, 2012, ReconTrust recorded a  
 10 notice of trustee's sale, indicating a sale date of February 14, 2012, at 10:00 am. (Doc. #4, Ex. G).  
 11 On or about February 8, 2012, plaintiff filed her complaint. (Doc. #1, Ex. A). On or about February  
 12 10, 2012, plaintiff filed a lis pendens on the property. (Doc. #4, Ex. H).

13 Plaintiff's complaint alleges the following: (1) defendant engaged in deceptive business  
 14 practices and violated NRS § 598; and (2) defendant violated NRS chapter 107. (Doc. #1, Ex. A).  
 15 Plaintiff alleges that MERS's status as a nominee does not give it the ability to assign the note and  
 16 the deed of trust. (Doc. #1, Ex. 1). Plaintiff contends that the assignment of the note has to meet the  
 17 requirements of the pooling and servicing agreement. (Doc. #1, Ex. 1). Plaintiff seeks declaratory  
 18 relief, injunctive relief, and attorney's fees. (Doc. #1, Ex. A).

## 19 Discussion

### 20 1. Motion to Remand

21 Plaintiff first argues that the court should realign the parties such that ReconTrust is the  
 22 plaintiff for purposes of removal. Pursuant to 28 U.S.C. § 1441(a), only defendants have the right  
 23 to remove a case from state court to federal court. Thus, if the court realigns the parties, as the  
 24 plaintiff ReconTrust would not have the right to remove the case.

25 In support of her assertion that the court should realign the parties, plaintiff cites several  
 26 cases, including two United States Supreme Court cases: *Chicago, R.I & P.R. Co. v. Stude*, 346 U.S.  
 27 574 (1954) and *Mason City & Ft. D.R. Co. v. Boynton*, 204 U.S. 570 (1907). The court realigned  
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1 the parties in those cases because the relevant state law classified the parties in a manner contrary  
 2 to federal law; the court held that federal law determines the identities of the plaintiff and defendant  
 3 for removal purposes. *See Stude*, 346 U.S. at 580.

4 The cases are inapposite. Here, plaintiff instituted the case in state court. The complaint asks  
 5 the court to enjoin any foreclosure and award damages. Thus, plaintiff has acted as a plaintiff  
 6 throughout the course of this case. It would be inappropriate to realign the parties, and the court  
 7 declines to do so.

8 Second, plaintiff argues that the \$75,000 amount in controversy requirement has not been  
 9 met. Specifically, plaintiff notes that the complaint only seeks recovery in excess of \$10,000.  
 10 Further, plaintiff argues that the injunctive relief claims do “not amount to a monetary award.”

11 “In actions seeking declaratory or injunctive relief, it is well established that the amount in  
 12 controversy is measured by the value of the object of the litigation.” *Cohn v. Petsmart, Inc.*, 281  
 13 F.3d 837, 841 (9th Cir. 2002). In this case, the loan at issue is for \$550,000. Therefore, the amount  
 14 in controversy requirement is met. Accordingly, the court declines to remand this case to state court.

## 15 2. Motion to Dismiss

### 16 (a) *Legal Standard*

17 A court may dismiss a plaintiff's complaint for “failure to state a claim upon which relief can  
 18 be granted.” FED. R. CIV. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain  
 19 statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2); *Bell*  
 20 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual  
 21 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the elements  
 22 of a cause of action.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Papasan v. Allain*, 478  
 23 U.S. 265, 286 (1986)). “Factual allegations must be enough to rise above the speculative level.”  
 24 *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient  
 25 factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 129 S.Ct. at 1949  
 26 (internal citation omitted).

1 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when  
 2 considering motions to dismiss. First, the court must accept as true all well-pled factual allegations  
 3 in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950.  
 4 Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not  
 5 suffice. *Id.* at 1949. Second, the court must consider whether the factual allegations in the complaint  
 6 allege a plausible claim for relief. *Id.* at 1950. A claim is facially plausible when the plaintiff's  
 7 complaint alleges facts that allows the court to draw a reasonable inference that the defendant is  
 8 liable for the alleged misconduct. *Id.* at 1949. Where the complaint does not permit the court to  
 9 infer more than the mere possibility of misconduct, the complaint has "alleged – but not shown – that  
 10 the pleader is entitled to relief." *Id.* (internal quotations omitted). When the claims in a complaint  
 11 have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed.  
 12 *Twombly*, 550 U.S. at 570.

13 (b) Analysis

14 i. Deceptive Business Practices and Violation of §§ 598 *et. seq.*

15 Plaintiff claims that defendant's deceptive conduct beached the obligations under NRS §§  
 16 598, *et. seq.*, including, but not limited to: NRS § 598.0915(5), NRS § 598.0915(15), and NRS §  
 17 598.092(8).

18 Nevada Revised Statutes § 598.0915 and § 598.092 deal with goods and services, not real  
 19 estate. *See* NRS § 598.0915(1)-(15) (2011) (describing deceptive trade practices dealing with goods  
 20 or services); *see also* NRS § 598.092(8) (2011) (describing deceptive trade practices dealing with  
 21 goods or services); *Reyna v. Wells Fargo Bank, N.A.*, No. 2:10-cv-01730-KJD-RJJ, 2011 WL  
 22 2690087, at \*9 (D. Nev. July 11, 2011) (finding that NRS § 598 only applies to goods and services  
 23 and not real estate transactions); *Alexander v. Aurora Loan Service*, No. 2:09-cv-1790-KJD-LRL,  
 24 2010 WL 2773796, at \*2 (D. Nev. July 8, 2012) (finding that NRS § 598 does not provide relief for  
 25 claims that deal with real estate transactions because NRS § 598 is for the sale of goods and  
 26 services); *Parker v. Greenpoint Mortgage Funding*, No. 3:11-cv-00039-ECR-RAM, 2011 WL  
 27 2923949, at \*6 (D. Nev. July 15, 2011) (finding that NRS 598 does not cover a mortgage foreclosure  
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1 because this activity is not considered as conducting business in the state). Therefore, these statutes  
2 do not apply to the present case.

3 In alleging fraud or mistake, a party must state with particularity the circumstances  
4 constituting fraud or mistake. FED. R. CIV. P. 9(b). To meet this standard, plaintiff must present  
5 details regarding the “time, place, and manner of each act of fraud, plus the role of each defendant  
6 in each scheme.” *Lancaster Com. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir.  
7 1991). Plaintiff’s complaint must put the defendant on notice of the particular misconduct that  
8 defendant is alleged to have committed so that defendant can properly defend against all allegations.  
9 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104-05 (9th Cir. 2003).

10 Plaintiff’s complaint states that defendant engaged in deceptive business practices by  
11 preparing and executing false documents. However, the complaint fails to plead with particularity.  
12 (Doc. #1, Ex. A). The complaint does not indicate who engaged in which deceptive business  
13 practices. The complaint does not state a time, place, or manner in which the false documents were  
14 produced. Plaintiff alleges that defendant engaged in these practices, but does not plead this claim  
15 with particularity. (Doc. #1, Ex. A).

16 Accordingly court dismisses plaintiff’s deceptive business practices and violation of NRS  
17 §§ 598 claims.

18 ii. Violation of NRS Chapter 107

19 The lender is allowed to make MERS a nominee in order to secure the note. *Roberts v.*  
20 *McCarthy*, 2011 WL 1363811, at \*4 (D. Nev. Apr. 11, 2011). Under NRS § 107.080, acting as the  
21 nominee, MERS is able to substitute a trustee. *Id.*

22 Plaintiff argues that defendant failed to comply with the requirements of NRS § 107. Under  
23 NRS 107.028(4), “A beneficiary of recording may replace its trustee with another trustee. The  
24 appointment of a new trustee is not effective until the substitution of trustee is recorded in the office  
25 of the recorder of the county in which the real property is located.” NRS 107.028(4).

26 MERS was the original beneficiary under the deed of trust. (Doc. #4, Ex. A). MERS recorded  
27 the substitution of trustee on or about September 10, 2009, making ReconTrust the new trustee.  
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(Doc. #4, Ex. C). This document was properly recorded with the county recorder's office. (Doc. #4, Ex. C). Pursuant to NRS § 107.028(4), the status of trustee becomes effective once the substitution agreement is recorded, which occurred on September 10, 2009. (Doc. #4, Ex. C).

Furthermore, under NRS § 107.080(1), "Except as otherwise provided in NRS 106.210, 107.085 and 107.086, if any transfer in trust of any estate in real property is made after March 29, 1927, to secure the performance of an obligation or the payment of any debt, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation for which the transfer is security." NRS § 107.080.

The note indicates that the note is a security instrument. (Doc. #8). On or about May 1, 2009, plaintiff defaulted on her loan. (Doc. #8). ReconTrust was created as the substitute trustee and therefore had authority to secure performance of the obligation or the payment of any debt through the power of sale. (Doc. #4, Ex. C). NRS § 107.028. Plaintiff does not deny that she is in default. (Doc. #1, Ex. 1). As the trustee, ReconTrust was authorized to institute foreclosure proceedings. (Doc. #8).

Defendant has the authority to collect a debt as a trustee. Therefore, plaintiff's chapter 107 claims are dismissed.

### iii. Expunge Lis Pendens

Pursuant to NRS 14.015(3), the party who recorded the notice "must establish to the satisfaction of the court . . . [t]hat the party . . . is likely to prevail in the action."

Here, plaintiff has not demonstrated that she is likely to prevail in the action. The court has dismissed all claims in the complaint for failure to state a claim upon which relief can be granted. Accordingly, plaintiff has not established a likelihood of success. NRS 14.015(3).

### iv. Declaratory relief, injunctive relief and attorney's fees

A claim for declaratory relief is a remedy, not a cause of action. *See Stock West, Inc v. Confederated tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th. Cir. 1989). The declaratory relief remedy derives from the substantive claims for relief. *Roberts v. McCarthy*, 2011

1 WL 1363811, at \*4 (D. Nev. Apr. 11, 2011). Similarly, injunctive relief is a remedy, not an  
2 independent cause of action. *Alandia v. US Bank*, 2009 WL 4611442, at \*3 (d. Nev. 2009). If the  
3 substantive claim fail, then the claims for declaratory and injunctive relief also fail.

4 As discussed in this order, plaintiff's substantive claims fail to state a claim upon which relief  
5 can be granted. Therefore, plaintiff's claims for declaratory and injunctive relief and attorney's fees  
6 also fail.

7 Accordingly,

8  
9 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's motion to  
10 remand (doc. #7) be, and the same hereby is, DENIED.

11 IT IS FURTHER ORDERED that defendant's motion to dismiss (doc. #4) be, and the same  
12 hereby is, GRANTED.

13 DATED June 6, 2012.

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16 **UNITED STATES DISTRICT JUDGE**  
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